

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

OWCP accepted that on January 9, 2009 appellant, then a 42-year-old special agent, sustained two gunshot wounds to the left lower leg and a venous embolism while serving a search warrant. He underwent a bulletectomy shortly after the injury and received compensation for temporary total disability.

In reports from March 8 to June 29, 2010, Dr. Michael Weinick, an attending Board-certified psychiatrist and osteopath, diagnosed sensory neuropathy and chronic pain disorder in the left leg with consequential depression. OWCP expanded the claim to accept left anterior and lateral compartment syndrome and authorized August 9, 2010 surgery to remove a retained bullet fragment. Appellant remained off work after the surgery.

In a December 14, 2011 report, Dr. Harry A. Doyle, an attending Board-certified psychiatrist and neurologist, diagnosed dysthymic disorder, complex regional pain syndrome of the left leg causally related to the accepted injuries. He found appellant totally disabled for work. On January 16, 2012 OWCP obtained a second opinion from Dr. Joseph W. Slap, a Board-certified psychiatrist and neurologist, who diagnosed post-traumatic stress disorder related to the accepted injuries. Dr. Slap found that appellant had no psychiatric disability for work. Based on his opinion, OWCP expanded the claim to accepted post-traumatic stress disorder.

OWCP found a conflict of medical opinion between Dr. Doyle, for appellant and Dr. Slap, for OWCP, regarding the nature and extent of any psychiatric conditions related to the accepted injuries. To resolve the conflict, it selected Dr. Gladys Fenichel, a Board-certified psychiatrist, as impartial medical specialist. OWCP scheduled an examination for 9:00 a.m. on March 16, 2012. The record contains print screens from the selection process showing OWCP contacted seven physicians prior to selecting Dr. Fenichel. Each screen indicates either that the physician could not be reached or the reason why the physician could not conduct the requested examination.

In a March 12, 2012 letter, counsel objected to OWCP's selection of Dr. Fenichel as impartial medical specialist, asserting that she demonstrated bias in testimony for insurance companies and in state workers' compensation cases. He cited to *Smith v. Reliance Standard Life Insurance Co.*,<sup>2</sup> in which the court found that Dr. Fenichel "gave no consideration" to neuropsychological test results from an examining physician in her impartial evaluation of an insured's condition. The court found that "[t]his type of 'cherry picking' among the findings of a treating physician raises questions about whether the review was objective or was designed to 'substantiate the desired decision to limit benefits.'" In *McGee v. Standard Life Insurance Co.*,<sup>3</sup> the court found Dr. Fenichel's reasons for finding the insured not disabled for work overlapped "reasons separately stated by Reliance" and that she "unreasonably t[ook] out of context" one facet of a medical record "which otherwise supports a finding of disability...." In *Kolcharno v. W.C.A.B.*,<sup>4</sup> the state workers' compensation appeals board found Dr. Fenichel's opinion that the

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<sup>2</sup> 322 F. Supp. 2d. 1168, 1177 (D. Co. 2004).

<sup>3</sup> 259 F. Supp. 2d 955, 966 (2003).

<sup>4</sup> 732 A. 2d. 676, 679 (1999).

claimant's condition was not related to an accepted occupational incident was not credible or persuasive.<sup>5</sup>

Counsel also submitted a December 15, 1993 letter to Dr. Fenichel from the Commonwealth of Pennsylvania, Department of State Bureau of Professional and Occupational Affairs closing a formal complaint filed against her for alleged unethical behavior in several evaluations referred by various attorneys and rehabilitation companies. The prosecuting attorney cautioned that Pennsylvania statute required physicians to "maintain medical records for patients which accurately and completely reflect their evaluation and treatment of the patient."

In a second March 12, 2012 letter, counsel alleged that OWCP did not properly utilize the Protective Distribution Systems (PDS) as it did not select a physician within appellant's zip code although there were numerous Board-certified psychiatrists from which to choose. He asserted that Dr. Fenichel received a greatly disproportionate number of FECA claim referrals, implying that OWCP was deliberately directing cases to her and bypassing some 200 qualified psychiatrists.

By decision dated March 14, 2012, OWCP denied appellant's request to participate in the selection of IME on the grounds that he had not shown good cause for contesting the selection of Dr. Fenichel. It found that there was "nothing in the documentation [counsel] forwarded ... that casts doubt on the integrity of Dr. Fenichel. The fact that there may be a disagreement between physicians is not a basis for questioning the physician's integrity." OWCP noted that the March 16, 2012 appointment remained as scheduled and that appellant was expected to attend.

### **LEGAL PRECEDENT**

If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.<sup>6</sup>

A claimant who asks to participate in selecting the referee physician or who objects to the selected physician should be requested to provide his or her reason for doing so. OWCP's claims examiner is responsible for evaluating the explanation offered. If the reason is considered acceptable, the scheduler will prepare a list of three specialists and ask the claimant to choose one. This is the extent of the intervention allowed by the claimant in the process of selection or examination. If the reason is not considered valid, a formal denial of the claimant's request, including appeal rights, may be issued if requested.<sup>7</sup> The procedural opportunity of a claimant to

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<sup>5</sup> Counsel also cited to three other state compensation cases in which the state board gave greater weight to another physician's opinion than to Dr. Fenichel: *M & B Inn Partners, Inc. v. Workers' Compensation Appeals Board (Petrage)*, 940 A. 2d. 1255 (2008); *Brobst v. Workers' Compensation Appeals Board (Schuykill Products)*, 824 A.2d 411(2003); *Grimes v. Workers' Compensation Appeals Board (Proctor and Gamble)*, 679 A.2d 1356 (Pa. Commw. 1996).

<sup>6</sup> 5 U.S.C. § 8123.

<sup>7</sup> See also *M.A.*, 59 ECAB 355 (2008); Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.4(f) (July 2011).

participate in the selection of an impartial medical specialist is not an unqualified right as OWCP has imposed the requirement that the employee provide a valid reason for any participation request or for any objection proffered against a designated impartial medical specialist.<sup>8</sup>

OWCP's procedures further provide that a claimant who asks to participate in selecting the referee physician or who objects to the selected physician should be requested to provide his or her reason for doing so. OWCP is responsible for evaluating the explanation offered. Examples of circumstances under which the claimant may participate in the selection include (but are not limited to): (a) Documented bias by the selected physician; (b) Documented unprofessional conduct by the selected physician; (c) A female claimant who requests a female physician when a gynecological examination is required; or (d) A claimant with a medically documented inability to travel to the arranged appointment when an appropriate specialist may be located closer. Simple preference for examination in a particular location will not be considered a valid reason. If the reason is considered acceptable, the scheduler will prepare a list of three specialists available through the medical management application (MMA) within the Integrated Federal Employees' Compensation System, including a candidate from a minority group if indicated and ask the claimant to choose one. This is the extent of the intervention allowed by the claimant in the process of selection or examination. If the reason offered is not considered valid, a formal denial on the claimant's request, including appeal rights, may be issued if requested.<sup>9</sup>

Unlike the selection of second opinion examining physicians, the selection of a referee physician is made on a strict rotational basis. The selection of a physician to perform a referee medical examination is done by using MMA.<sup>10</sup> The MMA contains the names of physicians who are Board-certified in certain specialties. The services of all available and qualified Board-certified specialists will be used as far as possible to eliminate any inference of bias or partiality. This is accomplished by selecting physicians (in the designated specialty in the appropriate geographic area) in alphabetical order as listed in the roster and repeating the process until the list is exhausted.<sup>11</sup>

The MMA contains an automatic and strict rotational scheduling feature. This application provides for consistent rotation among physicians and records the information needed to document the selection of the physician.<sup>12</sup> Selection of a referee physician should be made only through the MMA (absent exceptional circumstances) and OWCP may not dictate which physician will serve as a referee examiner.<sup>13</sup> The Board has placed great importance on

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<sup>8</sup> See *David Alan Patrick*, 46 ECAB 1020 (1995). Although there is no set standard for the timeliness of a request to participate in selection of an impartial medical examiner, it is logical that such a request should be made prior to the selection process.

<sup>9</sup> Federal (FECA) Procedure Manual, *supra* note 7.

<sup>10</sup> *Id.* at 3.500.4(b).

<sup>11</sup> *Id.* at 3.500.4(b)(6).

<sup>12</sup> *Id.* at 3.500.5.

<sup>13</sup> *Id.* at 3.500.5(b).

the appearance as well as the fact of impartiality and only if the selection procedures which were designed to achieve this result are scrupulously followed by the selected physician carries the special weight accorded to an impartial specialist.<sup>14</sup>

### ANALYSIS

OWCP accepted that appellant sustained two gunshot wounds to his left lower leg, a venous embolism, left anterior and lateral compartment syndrome and post-traumatic stress disorder. Dr. Doyle, an attending Board-certified psychiatrist, found appellant totally disabled for work due to dysthymic disorder and complex regional pain syndrome. Dr. Slap, a Board-certified psychiatrist and second opinion physician, diagnosed post-traumatic stress disorder that did not affect appellant's ability to work. OWCP found a conflict of opinion between Dr. Dole and Dr. Slap. On March 5, 2012 it selected Dr. Fenichel, a Board-certified psychiatrist, to serve as impartial medical examiner in the case and resolve the conflict of opinion.

On March 12, 2012 counsel objected and requested to participate in the selection process upon notification of Dr. Fenichel's selection. OWCP's procedures state that a claimant may be allowed to participate in selecting the referee physician when providing a reason for doing so, for example, "documented bias by the selected physician" or "documented unprofessional conduct by the selected physician."<sup>15</sup> OWCP denied appellant's request to participate in selection of the impartial medical specialist, finding that counsel did not submit evidence "that casts doubt on the integrity of Dr. Fenichel."

Regarding the allegation of bias, counsel submitted two insurance decisions in which the court found that Dr. Fenichel's weighing of the evidence cast doubt on her professional objectivity.<sup>16</sup> He also submitted a Pennsylvania State workers' compensation decision in which the judge found Dr. Fenichel's opinion negating disability was not credible in light of the evidence.<sup>17</sup> While the courts may have discredited the weight of Dr. Fenichel's analysis of the medical evidence, that fact without more is insufficient to establish bias. The Board therefore finds that appellant has failed to provide an adequate reason for participating in the selection process of the IME.

The Board discussed the criteria for finding bias by an IME in *J.S.*<sup>18</sup> In that case, the claimant alleged "documented bias" by the selected physician, as a state workers' compensation judge found the physician's testimony biased and preposterous. While OWCP found the claimant's objections insufficient, the Board found that the judicial finding of explicit bias,

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<sup>14</sup> See, e.g., *Leonard W. Waggoner*, 37 ECAB 676 (1986) (where the claimant was not afforded the opportunity to participate in the selection of the impartial specialist and where the examining physician's opinion would undermine the appearance of impartiality or would appear to compromise the integrity of the system for selecting impartial specialists).

<sup>15</sup> See *supra* note 9.

<sup>16</sup> *Smith v. Reliance Standard Life Ins. Co.*, *supra* note 2; *McGee v. Standard Life Ins. Co.*, *supra* note 3.

<sup>17</sup> *Kolcharno v. W.C.A.B.*, *supra* note 4.

<sup>18</sup> Docket No. 10-2198 (issued July 26, 2011).

coupled with the claimant's objection prior to the scheduled examination, was sufficient to allow his participation in selection of the IME. In the present case, the evidence provided by appellant is insufficient.

The circumstances of the present case may also be distinguished from the Board's finding of bias in *Geraldine Foster*.<sup>19</sup> In that case, the claimant timely objected to the selection of an IME and requested to participate in the selection process. In support of his objection, he submitted copies of Pennsylvania court decisions in which the judge denigrated the credibility and integrity of the physician's testimony. Upon appeal, the Board reversed OWCP's decision by finding the evidence, coupled with the timing of the objection, sufficient to warrant participation in the selection of the IME. In *Foster*, the courts found the physician's judgment to be fundamentally biased against claimants. In contrast, the judges in the cases cited by counsel in the present claim disagreed with Dr. Fenichel's weighing of medical evidence.

To support his allegation of unprofessional conduct, counsel submitted a December 13, 1993 letter from a state bureau of professional and occupational affairs, closing a complaint against Dr. Fenichel without a finding against her. Although the prosecuting attorney cautioned Dr. Fenichel to maintain complete and accurate records, there was no finding of misconduct. The Board therefore finds that counsel did not submit sufficient evidence to support his allegation of unprofessional conduct.

Alternatively, counsel contended that Dr. Fenichel could not serve as an IME in the case as OWCP did not properly select her using the PDS.<sup>20</sup> The Board finds that OWCP properly used MMA, contacting seven physicians prior to obtaining the appointment with Dr. Fenichel. OWCP's proper use of MMA selection process is clearly demonstrated by the evidence of record.

As counsel did not submit evidence establishing bias or professional misconduct by Dr. Fenichel, or that OWCP did not properly utilize MMA, OWCP properly denied his request to participate in selection of an IME.

On appeal, counsel asserted that Dr. Fenichel was not qualified to serve as an IME due to documented bias and unprofessional conduct. As stated above, the evidence does not establish either bias or unprofessional conduct by Dr. Fenichel.

### **CONCLUSION**

The Board finds that OWCP properly denied counsel's request to participate in selection of an IME.

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<sup>19</sup> 54 ECAB 435 (2003).

<sup>20</sup> PDS is the predecessor of MMA. See Federal (FECA) Procedure Manual, *supra* note 7.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 14, 2012 is affirmed.

Issued: February 15, 2013  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board